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AUTHOR Rodgers, Raymond S.; Lujan, Phillip
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ABSTRACT

The court case, "Santa Clara Pueblo, et al. v. Julia Martinez, et al.," is the subject of this paper. It gives the background of the case of a woman whose children were refused admittance to tribal rolls because of an ordinance prohibiting the enrollment of children whose father is not a tribal member. The paper gives the arguments of representatives of the Pueblo perspective and of the Anglo perspective, both of which appeal to natural law: the tribe's claim to the right to decide its own membership and the plaintiff's invocation of the right to equal protection under the law. The paper concludes with the philosophical and intercultural implications of the Supreme Court's ruling in the case, which was that tribal sovereignty affords immunity to the tribe from federal suits. (TJ)

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NATURAL LAW, SANTA CLARA, AND THE SUPREME COURT

A Paper Presented at the Convention of the
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by

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Phillip Lujan

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RAYMOND S. RODGERS
North Carolina State University

and

PHILLIP LUJAN
University of Oklahoma

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NATURAL LAW, SANTA CLARA, AND THE SUPREME COURT

Writing in the Natural Law Forum, Professor Friedrich Kessler pointed out that "it is not surprising that conflicting values have been both defended and attacked in the name of natural law."[1] Somewhat more pungently, the Scandanavian jurisprudent Alf Ross wrote that the philosophy had been invoked "in the course of time to defend or fight for every conceivable kind of demand," and therefore, "like a harlot, natural law is at the disposal of everyone."[2] The present paper explores the difficulties which inherently arise when two litigants, both founding their arguments upon principles they believe to be self-evident, and thus "natural," collide. The case in point is Santa Clara Pueblo, et al v. Julia Martinez, et al and the collision is made more sensitive because the conflicting self-evident natural laws arose in different cultures which have had to interact regularly in the courts and elsewhere. The problem is further aggravated by the fact that both have acquired a substantial body of positive law to buttress them.

On the one side stands the tribal council of the Santa Clara Pueblo (and for that matter, all Indian tribes in the United States) basing their case ultimately upon the natural right of a sovereign tribe to determine its own membership, a self-evident principle in virtually all cultures and kinship groups and one which, in the case of Native Americans, has received recognition

in both tribal and federal law. On the other side stands Julia Martinez, and all other tribal females who married outside the tribe, invoking the Anglo-American right of equal protection of the law, a self-evident concept made manifest in the 14th Amendment to the U.S. Constitution and the 1968 Indian Civil Rights Act (ICRA). This paper begins with a brief look at the background of the case. Employing the jurisprudential notion of static versus dynamic normative systems, we then turn our attention to the arguments of representatives of the Pueblo perspective and those of the Anglo perspective in order to discover the ultimate bases of the conflict. We conclude by pointing out the philosophical and intercultural implications of the Supreme Court's ruling in the case.

The legal history of the case of Santa Clara Pueblo v. Martinez begins in 1939 with the passage by the tribe of an ordinance establishing certain membership rules. According to the 1939 ordinance, among other provisions, the children of male members who married non-members would enjoy tribal membership, but the children of female tribal members who married non-members would not. In 1941 Julia Martinez, a full-blooded member of the Santa Clara Pueblo, married Myles Martinez, a full-blooded Navajo whom she had met while away at the Santa Fe Indian School. They established residence at the Santa Clara Pueblo in 1941 and have lived there since. They had ten children, of whom eight survive. All the Martinez children were raised on the Pueblo, they all speak and understand Tewa, the traditional language, they all are allowed to practice the traditional religion and participate in the ceremonies of the Pueblo. Despite the 1939 ordinance, in 1946 Julia Martinez began her efforts to enroll her children

in the tribe. Beginning with the tribal council, then the Pueblo as a whole, and ultimately with representatives of the Bureau of Indian Affairs (BIA) and members of the United States Senate, the efforts of Mrs. Martinez to have her children declared members of the Pueblo were unsuccessful. Finally, in 1972, she filed suit in federal district court for the district of New Mexico under the 1968 ICRA seeking an injunction against enforcement of the 1939 membership ordinance. The case ultimately found its way to the 10th Circuit Court of Appeals and finally to the United States Supreme Court.

Ostensibly, the conflict in the Martinez case focused upon two questions: (1) Does the 1968 ICRA effectively waive tribal sovereign immunity from federal suits and thus enable federal courts to examine the tribal membership ordinance; and (2) Assuming immunity is waived, what legal standard of equal protection should be applied to a tribal situation.

At the federal district court level, the court ruled that the ICRA, when coupled with another federal statute granting federal jurisdiction over actions brought under any Act of Congress providing civil rights protection, did waive immunity from suit. This implicit waiver of tribal sovereign immunity was sustained at the Court of Appeals level. It is interesting that neither of the lower courts directed much attention to this issue. They rather summarily dismissed it because they had previously ruled affirmatively on the waiver. The Supreme Court, however, took a different tack and chose this issue to dispose of the case without reaching the merits of the second issue. Both the district court and the Appeals Court devoted considerable attention to the second issue, but they reached opposite conclusions. In summary,

two lower courts agreed that the federal court had jurisdiction, but disagreed upon the merits of the case; the Supreme Court avoided the necessity of ruling on the merits by finding differently on the jurisdictional question.[3] What we argue in this paper, and indeed what was argued by a number of interested parties to the litigation, is that the actual conflict goes much deeper than a conflict of laws, it goes to a conflict between the most basic principles of two cultures, one Native American, one Anglo-American.

The validity of laws is among the central questions of jurisprudence. For the natural law theorists validity hinges upon the extent to which a law conforms to the principles of morality; for the realists, laws are valid only when announced by judges; for the positivists, laws are valid if they are part of a valid legal system. An influential theorist in the positivist tradition is Hans Kelsen, Emeritus Professor of Political Science at UCLA. In his General Theory of Law and State Kelsen differentiates between two types of normative systems, the static and the dynamic. In Kelsen's theory we find explanation for the deeper divergence between tribal and Anglo culture as it pertains to legal conflicts.

The static system, says Kelsen, achieves validity for its norms,

> . . . by virtue of their contents: Their contents has an immediately evident quality that guarantees their validity, or, in other terms: the norms are valid because they are derivable from a specific basic norm as the particular is derivable from the general. The binding force of the basic norm is itself self-evident, or at least presumed to be so.[4]

The dynamic normative system, on the other hand, achieves validity for its particular norms by a very different process. Here,

> . . . the basic norm merely established a certain authority, which may well in turn vest norm-creating power in some other authorities. . . . The basic norm of a dynamic system is the fundamental rule according to which the norms of the system are to be created. . . . The system of norms we call a legal order is a system of the dynamic kind. Legal norms are not valid because they themselves or the basic norm have a content the binding force of which is self-evident. . . . A norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only.[5]

Kelsen tells us that natural law is a static system and positive law is a dynamic system and that this fundamental difference is what distinguishes the two. However, realizing that his explanation of positive law is incomplete without an accounting for the validity of the basic norm itself in a dynamic system, Kelsen explains that,

> . . . the validity of the basic norm of a given positive legal order does not rest on the dynamic principle. . . . The basic norm is not valid because it has been created in a certain way, but <u>its validity is assumed by virtue of its content. It is valid then, like a norm of natural law, apart from its merely hypothetical validity</u>. (emphasis added)[6]

What this tells us is that in the static system we may determine the validity of particular norms by merely intellectual processes of derivation; but in the dynamic system, validity is acquired only by acts of human will in <u>creating</u> norms in accordance with the fundamental rule for doing so. However, at the point of ultimate regression, we find that both systems are undergirded by truths held to be self-evident. The argument we make in this paper is that, despite the trappings of a positive legal order, Native Americans tend to view their normative system from the static perspective, while Anglo-Americans tend to view theirs as dynamic. The divergence between the two systems is explained by the fact that each is ultimately based upon a self-evidently valid postulate which is diametrically opposed to the other. To

find these postulates, we turn now to the arguments of the litigants and amicus curiae in the case of Santa Clara v. Martinez.

The arguments of numerous interested parties to the Martinez case mention the religious origins of the 1939 membership ordinance. Counsel for the Pueblo pointed out in their brief that,

> . . . the 1939 Ordinance is simply a written embodiment of a preexisting unwritten rule of membership that has been in existence from time immemorial. . . . and further that the Ordinance is essential to the cultural and religious heritage that is vital to the Tribe's existence.[7]

At least since the time of Spanish domination in the 17th century, the pueblos have been theocracies, governed by tribal councils made up of both elected secular chairmen and religious elders known as caciques. In this system the tribe's traditions and religion are transmitted patrilineally. The amicus curiae brief filed by the National Tribal Chairmen's Association pointed out in this connection that "the membership ordinance under attack preserves the Santa Claran culture by ensuring that children will be brought up in the traditional way, with the father imparting to his children the tribal customs and religion."[8]

Despite the fact that there also were economic motives underlying the 1939 ordinance, a chief concern was clearly to ensure the continuity of this religious instruction, for "under the historical Santa Clara pattern of political, social, and religious training, it cannot be imparted by an alien father."[9] This duty of natural fathers to teach the religious beliefs to their family "is part and parcel of larger tradition, based primarily on unanimity of action,"[10] mandating that all members of the Pueblo, male and female, have prescribed obligations to the culture, and these obligations are gender-specific and based

in the religion. Elsie Parsons noted in the American Anthropologist that such "distinctions of sex are marked in the Pueblo culture, in dress, in occupations, and in the ceremonial life. The distinctions are a matter of division of functions between the sexes rather than of subordination of one sex to the other."[11]

Perhaps the Anglo most knowledgeable about Pueblo culture is Dr. Florence Hawley Ellis, Professor Emeritus of Anthropology at the University of New Mexico. A student of Pueblo Indian culture for nearly fifty years, Dr. Ellis was requested by the Justice Department to prepare a report on "Santa Clara Social Organization and Citizenship" in connection with the Martinez case. In that report, which was cited in a number of amicus briefs, Dr. Ellis confirmed that the gender-based distinctions in the 1939 ordinance were not there for discriminatory purposes, but were rather aimed at "specialization between the sexes in certain categories of group activities." She went on to stress that "following the concept of sex specialization, men run the Tewa religious system."[12]

The question now before us is whether the 1939 ordinance is, in Kelsen's terms, derivable from more general self-evident norms "as the particular is derivable from the general." This question corresponds exactly to the one put by the attorneys for the Pueblo when, in couching their responses to 14th Amendment challenges to the ordinance, asked "whether there is any rational relation between the 1939 Santa Clara Ordinance and the cultural and traditional values of the tribe." If such a relationship obtained, they argued, "the Ordinance is a valid classification, and must be allowed to stand."[13]

It seems clear from the various arguments sampled that

such a derivation is possible. For the Santa Clarans, each norm, from the highly specific membership ordinance, to the notion of patrilineally transmitted religion, to the notion of gender-based role expectancies, each norm possesses self-evident validity. What then, is the "basic norm" of this particular static normative system? The governor of the San Ildefonso Pueblo identified it in his affidavit by saying, "The religion of the Pueblo is based on unity, that things are done communally, as a group. If one person breaks the unity, the basis of the action is broken and is, therefore, done in violation of the religion."[14]

Thus the legal rule embodied in the 1939 membership ordinance is ultimately derivable from a more general rule having to do with the patrilineal basis of tribal religion which is in turn derivable from an even more general rule having to do with the mandate for shared responsibility in the society which in turn appears to be the basic norm in Pueblo culture: unity. In this basic norm, the individual is subordinate to the society, and such a value is seen as self-evidently valid.

Over against this basic norm is set the equal protection clauses of the 1968 Indian Civil Rights Act and the 14th Amendment. The long history of Anglo-American common law testifies to the centrality of individual rights. From the Magna Carta to the Declaration of Independence to the Bill of Rights, individual liberty has been preeminent. The difference, though, is that such rights have always taken the form of <u>legal</u> rights. From the peers in a meadow at Runneymeade to the patriots in Philadelphia, care has always been taken that, as Kelsen pointed out, norms were created according to prescribed rules for doing so.

Recalling that the basic norm of a dynamic positive legal

order is the rule according to which all subsequent rules are made, we come to a clearer understanding of the notion of challenges to the "constitutionality" of particular ordinances like the 1939 membership rule. The argument of Julia Martinez and her attorneys that the 1939 ordinance is in violation of the ICRA's equal protection clause can thus be seen as a claim that the basic norm of rule creation is "constitutionality" and that the ICRA is valid under that norm but the 1939 ordinance is not. In their brief the Martinez lawyers argue that,

> The manifest purpose on the face of the ICRA is to impose enumerated standards of the constitution on self-governing Indian tribes. The standards are taken, mostly verbatim, from the Constitution, Art. 1, section 9, cl. 3 and amendments 1, 4, 5, 6, 8, and 14.[15]

Thus, superficially at least, we have a simple conflict between laws and a typical bit of grist for the mill of judicial review.

But where did Kelsen tell us the basic norm got its validity? From a self-evidently valid premise external to the positive legal order--a premise which was "like a norm of natural law." The amicus curiae brief filed by the American Civil Liberties Union on behalf of Julia Martinez is instructive for the task of finding this postulate.

The brief first establishes the constitutional validity of the ICRA by stating that it "is above all else a proclamation of individual liberties. The ICRA is first and foremost a Bill of Rights for individual indians."[16] Now that the nexus is made to the norm for rule-creation, the ACLU advocates are ready to assert the self-evidently valid base upon which it rests. They say,

> The decision to place the fundamental rights of the individual above the interests of the government is as apparent on the face of the ICRA as it is on the

> face of the Constitution and the Bill of Rights; it is the cornerstone of our form of government, and Congress has now extended those rights to reservation indians.[17]

Robert McCloskey, in his perceptive little book, The American Supreme Court, argued that the 18th century Americans were largely guided by two contradictory "ideals"--popular sovereignty and fundamental law.[18] They solved this dilemma by embodying one ideal in the other--by infusing the Constitution and Bill of Rights with the ideal of individual liberty. In the 20th century we now see that the ideal of popular sovereignty, individual liberty, forms the natural law basis for the dynamic system of jurisprudence embodied in the Constitution and our case-law. We also see that it is diametrically opposed to the natural law basis of Santa Claran culture: unity.

This conflict of philosophies did not escape notice of the attorneys for the National Tribal Chairmen's Association. They argued that,

> Because the United States, beginning with the 19th amendment in 1920, has engaged in a steady program of obliterating distinctions between the sexes, the court tested the Indian statute at bar in the light of that Anglo philosophy which is wholly alien to many Indian philosophies, Santa Claran philosophy included.[19]

Arguing similarly that Pueblo "world-view may be wholly different than our own," and that rules like the 1939 membership ordinance "may in fact be in harmony with the ideals" of such cultures, Alvin Ziontz, in his amicus brief for the Confederated Tribes of the Colville Indian Reservation, stated the conflict well:

> The great triumph of Western democracy is the establishment of the primacy of individual liberty against the power of the state. However, Indian tribes have traditionally stood in an entirely different relationship to their members than the state has to its citizens. Modern

> states in mass societies are faceless, impersonal and remote. Their actions present constant threats to individual freedom. Indian tribes are not comparable to mass societies. Typically, Indian communities are based on extended family principles and tribal government is part of that system.[20]

Ironically, the very motivation of Congress in passing the ICRA was to guarantee individual rights to Indians. The widespread opposition to the act by tribal lobbyists may indicate the strength with which opposing ideals are held.

The effect of the Supreme Court ruling, though obviously disappointing to civil libertarians, is to close the door to judicial scrutiny of non-criminal tribal judicial proceedings. The question we are left with is whether we can tolerate, in Stokely Carmichael's metaphor, a mulligan stew instead of a melting pot. The case of Santa Clara Pueblo v. Martinez leaves intact sub-cultural pockets into which the Bill of Rights does not entirely penetrate. If the first article of our faith is individual liberty, can we allow certain quasi-sovereign groups in the society to have as the first article of their faith the mandate of unity? Seven members of the Supreme Court said that we must.

ENDNOTES

[1]Friedrich Kessler, "In Memoriam: Jerome Frank," Natural Law Forum 2 (1957), p. 3.

[2]Alf Ross, "A Critique of the Philosophy of Natural Law," in M. P. Golding, The Nature of Law (New York: Random House, 1966), p. 69.

[3]For a more complete discussion of the historical background of the case, see Philip Lujan, "Communication Implications of the 'Martinez' Case for the Santa Clara Pueblo," A Paper Presented at the SCA Summer Conference on Intercultural Communication, July 17-21, 1978, Tampa, Florida.

[4]Hans Kelsen, General Theory of Law and State, trans. A. Wedberg, (New York: Russell & Russell, 1961), quoted in Golding, p. 124.

[5]Kelsen, pp. 125-126. [6]Kelsen, pp. 133-134.

[7]Prelo and Grodner, "Brief for Petitioners," Santa Clara Pueblo, et al v. Julia Martinez, et al, in the Supreme Court of the United States (October Tern, 1977), No. 76-682, at p. 8.

[8]George B. Christensen, et al, Counsel for Amicus Curiae, "Brief for the National Tribal Chairmen's Association in Support of Petitioners," in the Supreme Court of the United States, Santa Clara Pueblo v. Martinez, p. 17.

[9]Christensen, et al, p. 23.

[10]Philip R. Ashby, et al, "Brief of Amici Curiae of The Pueblo of Cochiti, the Pueblo of Isleta, the Pueblo of Jemez, the Pueblo of Laguna, the Pueblo of Sandia, the Puebloof San Felipe, the Pueblo of San Ildefonso, the Pueblo of Taos, the Hualapai Tribe, the Salt River Pima-Maricopa Indian Community, The Confederated Tribes of the Umatilla Indian Reservation and the All-Indian Pueblo Council, Inc., Santa Clara Pueblo v. Martinez, in the Supreme Court of the United States (October Term, 1977), p. 3.

[11]Elsie Parsons, "The Kinship Nomenclature of the Pueblo Indians," American Anthropologist 34 (1932), pp. 377-378. Quoted in Christensen, p. 27.

[12]quoted in Christensen, pp. 7A-8A.

[13]Prelo and Grodner, p. 27

[14]Statement of Hon. James R. Martinez, Governor of the Pueblo of San Ildefonso, quoted in Ashby, et al, p. 12A.

[15]Alan R. Taradash and Richard B. Collins, "Respondents Brief," Santa Clara Pueblo v. Julia Martinez, in the Supreme Court of the United States (October Term, 1977), No. 76-682, p. 11.

[16]Stephen L. Peval, et al, "Brief for Amicus Curiae," Santa Clara Pueblo v. Julia Martinez, in the Supreme Court of the United States (October Term 1977), No. 76-682, p. 16.

[17]Peval, p. 18.

[18]Robert McCloskey, The American Supreme Court (Chicago: The University of Chicago Press, 1960).

[19]Christensen, et al, p. 5.

[20]Alvin Ziontz, "Brief for Amicus Curiae," Santa Clara Pueblo v. Julia Martinez in the United States Supreme Court (October Term 1977), No. 76-682, at p. 19.